

H R 12080

January 22, 1974

Analysis of H. R. 12080, A Moorhead
Amendment to the Freedom of Information Act

1. This memorandum sets out our comments on H. R. 12080, a bill by Congressman Moorhead (December 20, 1973) to amend the Freedom of Information Act (5 USC 552). This is a companion bill to H. R. 12004, on which we commented in our memorandum of 16 January 1974. A third bill, H. R. 12135, by Congressman Erlernborn, also would amend the Freedom of Information Act. We will review that bill shortly.

2. The bill is in four sections, as follows:

(a) Subsection 1(a) would require departments and agencies to "publish, and distribute (by sale or otherwise) copies of" indices of certain specified documents. Under the present FOI provision, departments are required only to make such indices "available for public inspection and copying." In the main, the documents which must be indexed are not documents which CIA would have. The amendment therefore would not be significant to CIA. (This Office is studying the requirement for indexing, in order to assist in determining what documents, if any, we should be indexing now.)

(b) Subsection 1(b) amends the language by which the Act requires that identifiable records requested by a member of the public must be made available, but no significant change in meaning is apparent in the new language. The amended language is perhaps more clear and it may be that Congressman Moorhead feels that under existing language agencies have been adopting subterfuges.

(c) Subsection 1(c) establishes a timetable for agencies' action on requests for documents. The request is to be acknowledged in writing within 5 days, the decision is to be made within 10 days and if, as the

amendment permits, the decision is appealed to the head of the agency, his decision must be made within 20 days. The subsection also facilitates access to the courts by providing that when an agency fails to act within the time frame specified, the requestor "shall be deemed to have exhausted his administrative remedies." This is significant to the rights of requestors to bring suit because of the principle of administrative law that a petitioner must exhaust his administrative remedies before bringing suit. This feature, of course, puts teeth in the action timetable.

(d) Subsection 1(d) would modify the provision of the Act which gives United States district courts jurisdiction to determine matters arising under the Act. The significant sentence in subsection 552(a)(3) would be revised to read as follows: "In such a case, the court shall determine the matter de novo, including by examination of the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b), and the burden is on the agency to sustain its action" (the underlined language would be added by the bill). This amendment ties in with the amendment (at section 2 of the bill) of the first exemption established by the current FOI Act, and also with the extensive amendments proposed in H. R. 12004 (see OGC memorandum dated 16 January 1974). The present Exemption No. 1 authorizes departments to withhold from requestors any document or information which involves matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy". The amended Exemption would authorize withholding of documents involving matters that are "authorized under criteria established by an Executive order or statute to be kept secret in the interest of the national defense or foreign policy." The intent apparently is to authorize federal district courts to examine the documents (but in camera only) in order to determine whether the decision to classify was authorized "under criteria established by an Executive order or statute". Thus an affidavit by an agency head that the action was so authorized would not suffice and the court would determine that question.

(e) Subsection 1(e) negates one of the Federal Rules of Civil Procedure by requiring the government to respond in 20 days when suit is brought against the government under the Act. The Federal Rule provides 60 days for the government's response. Subsection 1(e) also permits the court to assess attorney fees and other litigation costs against the United States.

(f) Subsection (f) amends Exemption No. 1 under the Freedom of Information Act. See comments at subparagraph (d) above.

(g) Subsection 3 establishes a reporting requirement by which the performance of the departments under the FOI Act may be made known to and judged by the Congress and, presumably, the public. Annually, on or before 1 March, each department is to submit a report to the House Committee on Government Operations, the Senate Committee on Government Operations, and the Senate Committee on the Judiciary. The report shall report the number of determinations made by the department not to comply with requests for records "and the reasons for each such determination"; the number of appeals from such decisions; the results of such appeals and the reasons for the decisions by which appeals are denied; a copy of "every rule made by such agency regarding" the Freedom of Information Act; a copy of the fee schedule and the total amount of fees collected by agencies for making records available and "such other information as indicates efforts to administer fully this section. Section 3 also includes a definition of "agency", to include all components of the executive branch.

(h) Section 4 establishes the effective date of the Act, which is 90 days after enactment.



Associate General Counsel

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Remarks:

Attached is our comments on H. R. 12080,
another Moorhead bill to amend the Freedom
of Information Act.

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